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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 72-1529

UNITED STATES OF AMERICA,
Petitioner,

vs.

JOHN DOWDY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**BRIEF FOR RESPONDENT JOHN DOWDY
IN OPPOSITION**

OPINION BELOW

The opinion of the court of appeals is not as yet officially reported, but is appended to the Petition for a Writ of Certiorari. The opinion was delivered on 12 March 1973, and a Petition for Rehearing was denied on 27 April 1973.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the prosecution of Respondent violated the constitutional immunity afforded a congressman by the Speech or Debate Clause when the indictment and the proof at trial are substantially composed of allegations and evidence of (a) duly authorized actions taken by Respondent as chairman of a subcommittee of the District of Columbia Committee in investigating, along with counsel to the Committee, a citizen's complaint in order to determine whether committee hearings were justified, and (b) Respondent's motivation in taking such action.

2. Whether the admission of evidence by the trial court that was held by the court of appeals to be improper as entailing an inquiry into legislative acts and motives that was protected from outside examination by the Speech or Debate Clause (Article I, § 6) of the Constitution and which therefore required a reversal of conviction and a remand for new trial on count 1 (conspiracy to accept unlawful compensation in violation of 18 U.S.C. 203), count 2 (conspiracy to obstruct a proceeding before the Department of Justice in violation of 18 U.S.C. 1505), count 3 (unlawful travel in interestate commerce in order to facilitate bribery in violation of 18 U.S.C. 201), and counts 4 and 5 (perjury in violation of 18 U.S.C. 1621), likewise requires a reversal and remand for new trial of the remaining counts 6, 7 and 8 (perjury in violation of 18 U.S.C. 1621).

Respondent has filed with the Court a Petition for a Writ of Certiorari on 25 May 1973, No. 72-1584. Such Petition presents additional questions which may be entertwined with the questions presented by the Government's Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant constitutional provisions and statutes are set forth at pp. 2-6 of the Government's Petition.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct, although it understates the proof offered by the Government of legislative acts on the part of Respondent.

ARGUMENT

The court of appeals correctly concluded that evidence was improperly admitted by the trial court upon the grounds that same entailed an inquiry into legislative acts and motives that was protected from outside examination by the Speech or Debate Clause (Article I, § 6) of the Constitution. There is no occasion for review of this part of the judgment of the court below.

1. Petitioner contends that the bribery and conflict of interest statutes are narrowly drawn statutes passed by Congress in the exercise of its legislative power to regulate conduct of its members, and therefore prosecution thereunder is proper even though it entails an inquiry into legislative acts and motives that would otherwise have been protected from outside examination by the Speech or Debate Clause. Respondent considers that the ruling of the court below on the subject is in accord with the decisions of this Court in *United States v. Johnson*, 383 U. S. 169; *United States v. Brewster*, 408 U. S. 501; and *Gravel v. United States*, 408 U. S. 606. As this Court pointed out in *Gravel* (408 U. S. at 610, 629):

> "We have no doubt that Senator Gravel may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting.
>
> * * *
>
> "[T]he Speech or Debate Clause privilege . . . forbade questioning any witness . . . (1) concerning the Senator's conduct, or the conduct of his aides,

> at the June 29, 1971, meeting of the subcommittee; (2) concerning the motives and purposes behind the Senator's conduct, or that of his aides, at that meeting; (3) concerning communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator; (4) . . . concerning any act, in itself not criminal, performed by the Senator, or by his aides in the course of their employment, in preparation for the subcommittee hearing."

Substantial portions of the indictment and the Government's evidence in the trial court directly implicate Respondent's investigation to determine whether subcommittee hearings should be held, and such allegations and proof were improper under *Brewster* and *Gravel*.

The indictment is defective on its face because of its overwhelming reliance upon inquiry into legislative acts in proof of the conspiracy counts and of at least two of the perjury counts. Counts 1 and 2 of the indictment are faulty because 23 of the 45 overt acts alleged either constitute legislative acts or refer to legislative acts, and these impermissible references to legislative acts violate Respondent's constitutional immunity. By way of example, overt acts 19-23 of counts 1 and 2 encompass the entire investigation by Respondent and his subcommittee staff in preparation for a countemplated subcommittee hearing.

The court below rightly concluded that the Government's case at the trial was replete with impermissible proof of legislative acts consisting of Respondent's

> "conversations and arrangements with the United States Attorney, FHA and HHFA concerning Monarch. In connection with the last category, a considerable amount of documentary evidence of reports of investigations which defendant and [the general counsel of the legislative Committee] obtained was admitted into evidence" (Appendix to Pet., pp. 20a-21a).

2. In *United States v. Johnson*, 383 U. S. 169, 185, this Court refrained from passing on the question whether Congressman Johnson was entitled to a new trial on all counts where evidence of legislative acts was improperly admitted which required a new trial on one count.

Although the court of appeals in the instant case has ordered a new trial as to counts 1 through 5 [including two perjury counts] because evidence of legislative acts was improperly admitted to support the convictions of Respondent on these counts, nevertheless it concluded that the convictions on perjury counts 6-8 should stand (Appendix to Pet., p. 29a).

Respondent submits that such a ruling is inconsistent with the prior holding of the court of appeals in *United States v. Johnson*, 337 F. 2d 180, 204, aff'd 383 U. S. 169, 185, and should be considered by this Court if a review is granted of the Government's Petition.

3. There is no merit to Petitioner's contention that in any event, the activities undertaken by Respondent were not "legislative acts" immune from judicial inquiry under the Speech or Debate Clause. The court of appeals properly rejected the Government's argument that the scope of protection afforded by the Speech or Debate Clause is applicable only when a pure legislative motive is present, stating:

> "The clause does not simply protect against inquiry into acts which are manifestly legislative. In our view, it also forbids inquiry into acts which are purportedly or apparently legislative, even to determine if they are legislative in fact" (Appendix to Pet., p. 25a).

This view conforms with the rulings of this Court in *Gravel*, 408 U. S. at 625, and *Brewster*, 408 U. S. at 525.

CONCLUSION

The decision below is clearly correct with respect to the questions presented, and the Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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June, 1973